90-1444

SUPREME COURT, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF TEXAS, *Petitioner*

v.

CARY WAYNE COX, *Respondent*

Petition for a Writ of Certiorari to the Court of Appeals for the Second Court of Appeals District of Texas

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QUESTION PRESENTED

Whether Texas courts have misconstrued *Jackson v. Virginia*'s rational fact-finder test by requiring, in a circumstantial evidence case, that the evidence supporting the verdict exclude every reasonable hypothesis of innocence.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF TEXAS, *Petitioner*

v.

CARY WAYNE COX, *Respondent*

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Court of Appeals District of Texas.

OPINION BELOW

The opinion of the Court of Appeals has not been reported for publication. It is reproduced in the Appendix at A-1.

JURISDICTION

The Court of Appeals issued its opinion and judgment on June 14, 1990. The State timely filed a motion for rehearing on June 29, 1990, which was overruled on July 18, 1990. The State timely filed a petition for discretionary review on August 17, 1990. The Court of Criminal Appeals of Texas refused the petition on October 17, 1990. The State timely filed a motion for rehearing in the Court of Criminal Appeals on November 1, 1990, which was overruled on January 30, 1991. Jurisdiction in this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Laws 1973, ch. 426, art. 2, § 1, at 1124 (prior version of Tex. Penal Code §19.05), in pertinent part:

> (a) A person commits an offense if he:
>
> . . . .
>
> (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.
>
> (b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.

Tex. Rev. Civ. Stat. Ann. art. 6701*l*-1 (Vernon Supp. 1991), in pertinent part:

> (a) In this article:
>
> . . . .
>
> (2) "Intoxicated" means:
>
> (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
>
> (B) having an alcohol concentration of 0.10 or more.
>
> . . . .

(b) A person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place. The fact that any person charged with a violation of this section is or has been entitled to use a controlled substance or drug under the laws of this state is not a defense.

STATEMENT OF THE CASE

Tracey Higgins died when she was thrown off a motorcycle driven by Respondent. Respondent was convicted of involuntary manslaughter based on allegations that his intoxication caused Ms. Higgins' death. Purporting to apply the rational fact-finder test of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), but holding that in a circumstantial evidence case the proof supporting the verdict must exclude all reasonable hypotheses of innocence, the Court of Appeals ruled the evidence insufficient and ordered a judgment of acquittal.

The evidence

Respondent attended a party from 9:00 p.m. the night of June 26, 1987, until he left on the fateful motorcycle ride before sunrise the next morning. R. IV – 16-19, 49. The partygoers drank from a keg serving 380 cups of beer. R. IV – 18.

During the first part of the evening, Respondent consumed beer while playing a drinking game called "quarters." R. IV – 33-35. Around 1:00 a.m., he argued with Nadine Thalman, his former girlfriend, and chased her around a car. She was familiar with his behavior; that was the way Respondent acted when intoxicated. According to her, Respondent "could have been" intoxicated at that point. R. IV – 37-38.

About 4:45 a.m., Respondent borrowed a motorcycle and took Ms. Higgins, another guest at the party, for a ride. R. IV – 49. Respondent drank at least another one and a half beers not long before embarking. R. IV – 49, 75. The wreck

occurred shortly after the couple departed, about three blocks away. R. IV – 42-43, 49-50, 72.

After the accident, Respondent walked up to the injured girl, looked at her, and walked away. R. IV – 115. A passer-by tracked Respondent down and three times urged him to return to the scene to help the victim, but he refused. R. IV – 119-22. When asked why, Respondent pointed to a police car heading toward the scene and said, "[T]hat's the reason I can't go back down there . . . .they will take me to jail." R. IV – 122-23. The odor of alcohol on Respondent was "very very strong." R. IV – 119.

A paramedic called to treat Respondent also detected alcohol on his breath, R. IV – 148, as did a detective who talked to Respondent a couple of hours later at the hospital. R. IV – 264.

In conjunction with the taking of a blood sample from Respondent, the detective signed a form reciting that ". . . prior to the arrest I had reasonable grounds to believe, and do believe, that this person was driving or in actual physical control of a motor vehicle upon the public highways or upon a public beach in this State while intoxicated." R. VIII – 20 (State's exhibit 25). This document was admitted before the jury without restriction. R. IV – 220-21.

The blood sample showed Respondent had an alcohol concentration of 0.19 about two hours after the wreck. R. IV – 212-13, 238; V – 309. Testimony from a chemist and from the deputy medical examiner disclosed that the "legal limit for intoxication" in Texas is 0.10 and that Respondent's level was therefore almost twice that threshold. R. V – 309-10, 329.[1]

[1]When Ms. Higgins was killed, *intoxication* in the involuntary manslaughter statute was defined as the loss of one's normal mental or physical faculties as the result of the voluntary introduction of a substance into the body. See statute *supra*, p. 2. On the other hand, the statute setting out the "simple" offense of driving while intoxicated contained two definitions of intoxication, one of which defined that condition as an alcohol concentration of 0.10 or above. Tex. Rev. Civ. Stat. Ann. art. 6701*l*-1, §(a)(2) (Vernon Supp.

The opinion below; how the federal issue was raised

On appeal, Respondent argued that the evidence was insufficient under *Jackson v. Virginia* and Texas cases interpreting that decision. Appellant's brief, p. 8. The Court of Appeals set out the following standard for judging that claim:

> In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. State*, 672 S.W.2d 801, 803 (Tex.Crim.App. 1984); *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App. 1984) (opinion on reh'g); *Wilson v. State*, 654 S.W.2d 465, 471-72 (Tex.Crim.App. 1983) (opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, **a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant**. *Johnson v. State*, 673 S.W.2d 190, 195 (Tex.Crim.App. 1984); *Jackson*, 672 S.W.2d at 803.
>
> See Appendix at A-2 (emphasis added).

The Court of Appeals cites four Court of Criminal Appeals decisions in connection with its quotation from *Jackson v. Virginia*. We emphasize – and will explain in detail in the next section of the petition – that the issue raised is a federal question and not one concerning state law. All four of the Texas decisions embrace the rational fact-finder test of *Jackson v. Virginia* as ***the*** sufficiency test to be used for Texas criminal

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1991). See *supra* pp. 2-3. The Implied Consent Law (the statute which gave the detective the authority to obtain Respondent's blood sample) also contained that "per se" definition of intoxication. Tex. Rev. Civ. Stat. Ann. art. 6701*l*-5, §3(j) (Vernon Supp. 1991).

cases, but they also maintain that requiring the incriminating evidence to exclude every reasonable hypothesis of innocence is a proper method "for applying" the *Jackson v. Virginia* test in circumstantial evidence cases.

In its brief to the Court of Appeals, the State acknowledged that prevailing Court of Criminal Appeals decisions obligated the lower court to apply reasonable-hypothesis analysis as part of the *Jackson v. Virginia* test. However, the State explicitly challenged that analysis as conflicting with the true test of *Jackson v. Virginia*:

> The State continues to take issue with the Court of Criminal Appeals' formulation of the *Jackson* standard. *Jackson* makes it clear that the reasonable hypothesis test applied to circumstantial evidence cases is incorrect. Nevertheless, the Court of Criminal Appeals continues to apply it, labeling it an "analytical construct." The reasonable hypothesis test is actually the converse of the standard approved of in *Jackson*. Instead of asking if the jury could rationally have found guilt from the evidence, it asks if the jury could rationally have found innocence. *See Butler v. State*, 769 S.W.2d at 244 (concurring opinion).

State's brief in Court of Appeals, p. 6 n.1.

The Court of Appeals did not acknowledge the State's challenge, adopted reasonable-hypothesis analysis as its standard of review, and reversed and acquitted for insufficient evidence.

The State's motion for rehearing in the Court of Appeals again argued that reasonable-hypothesis analysis was inconsistent with *Jackson v. Virginia*. State's mot. for reh., pp. 7-8 (excerpts in Appendix at A-8-9.) The motion was overruled without opinion. Appendix at A-6.

The State's petition for discretionary review likewise contended that reasonable-hypothesis analysis conflicts with *Jackson v. Virginia*, providing a six-page discussion of essen-

tially the same cases and arguments made to this Court. State's pet. for review, pp. 11-17 (excerpts in Appendix at A-10-11). The State's petition was refused. Appendix at A-7.

The State's motion for rehearing following the refusal again raised the conflict between *Jackson* and the reasonable-hypothesis analysis. State's mot. for rehearing in Court of Criminal Appeals, pp. 2-4, 15. The motion for rehearing was overruled. Appendix at A-7.

REASONS FOR GRANTING THE WRIT

I. THE "REASONABLE HYPOTHESIS OF INNOCENCE ANALYSIS" WHICH THE TEXAS COURTS HAVE ENGRAFTED ONTO *JACKSON V. VIRGINIA*'S RATIONAL FACT-FINDER TEST IS IN DIRECT CONFLICT WITH *JACKSON* ITSELF, AS WELL AS WITH STATEMENTS BY THIS COURT IN *JOHNSON V. LOUISIANA*.

A. The Texas cases

We attack an interpretation of *Jackson v. Virginia*'s rational fact-finder test that began in a series of 1983 decisions by the Texas Court of Criminal Appeals. In those opinions, the Court of Criminal Appeals confirmed that Texas courts would use the *Jackson v. Virginia* test for judging the sufficiency of the evidence. However, the court held that in applying the *Jackson* test in circumstantial evidence cases a reviewing court should ask whether the evidence supporting the verdict excluded all reasonable hypotheses of innocence, and should reverse and acquit if the answer was negative. *Carlsen v. State*, 654 S.W.2d 444, 448-49 (Tex. Crim. App. 1983); *Freeman v. State*, 654 S.W.2d 450, 455-56 (Tex. Crim. App. 1983); *Denby v. State*, 654 S.W.2d 457, 463-64 (Tex. Crim. App. 1983);

Wilson v. State, 654 S.W.2d 465, 471-72 (Tex. Crim. App. 1983). *Carlsen* is considered the lead case on this issue.[2]

This Texas interpretation of *Jackson v. Virginia* is best illustrated by *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), which reaffirmed *Carlsen's* reasonable-hypothesis analysis as a way of implementing the *Jackson* test. First, *Butler* embraced the rational fact-finder test of *Jackson v. Virginia*:

> To recapitulate, the test as delineated in *Jackson* requires us, as the reviewing court, to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

Butler v. State, 769 S.W.2d at 239.

Second, the court held that "circumstantial evidence cases have no different standard of review than those cases supported by direct evidence," *Butler v. State*, 769 S.W.2d at 238, but it appended this footnote:

> Implicit in this statement is a question concerning the status of the reasonable hypothesis theory. We reiterate:
>
> **[W]e are unable to devise or discover any reason, . . . , for abandoning the utilitarian 'exclusion of outstanding reasonable hypotheses' analysis for applying the above 'standard for review' [*Jackson*] in circumstantial evidence cases.** By the nature of circumstantial evidence, in order to determine it rationally establishes guilt beyond a reasonable doubt, a process of elimination must be used . . . . **Stated in the converse, if the evidence supports an inference other than the guilt of the**

[2]In Respondent's case, the Court of Appeals named one of the 1983 decisions when setting out the applicable standard of review (*Wilson v. State*). Similarly, the two decisions cited for reasonable-hypothesis analysis cite back to the 1983 opinions. *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Crim. App. 1984); *Johnson v. State*, 673 S.W.2d 190, 195 (Tex. Crim. App. 1984). See Appendix at A-2.

> **appellant, a finding of guilt beyond a reasonable doubt is not a rational finding.**
>
> *Carlsen*, 654 S.W.2d at 449. We recognize that the United States Supreme Court declined, in *Jackson*, to adopt this theory as part of the *Jackson* standard for review. Likewise, we do not mean to imply an adoption of this theory as the standard of review for sufficiency of the evidence. **The reasonable hypothesis theory as utilized by this Court is merely an analytical construct to facilitate the application of the *Jackson* standard.**

Butler v. State, 769 S.W.2d at 238 n.1 (bold-faced emphasis added).

Two members of the Court of Criminal Appeals strongly criticized the use of this "analytical construct":

> Finally, I must point out the folly in the majority's denouncement of prior applications of *Jackson* while they themselves attempt to validate a method of sufficiency review that *Jackson* expressly disapproved. In footnote 1, the majority 'reiterates' the continued validity of the "outstanding reasonable hypothesis" theory, op. at 238. However, the *Jackson* Court explicitly rejected this notion . . . . [quoting from *Jackson v. Virginia*, 443 U.S. at 325-26]. Thus, *Jackson* specifically denounces the "reasonable hypothesis theory" while the majority embraces it. Further, whether this theory is euphemistically labeled as an "analytical construct" (see op. at 238, fn. 1) or a standard of review is of little moment; the resultant effect remains the same – the adoption of a theory of sufficiency review expressly denounced by *Jackson*. Thus, although the majority, by all auspices, fully adheres to *Jackson*, it appears to me that such adherence is disturbingly selective.

Butler v. State, 769 S.W.2d at 244 (Judge White, concurring in the result).

B. The conflict with this Court's decisions

As Judge White noted in his concurrence in *Butler*, this Court expressly rejected the argument that *Jackson*'s rational fact-finder test required the evidence to exclude all hypotheses of innocence:

> Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past . . . . We decline to adopt it today.

Jackson v. Virginia, 443 U.S. at 326-27, 99 S.Ct. at 2792-93.

Indeed, the majority in *Butler* acknowledged that this Court declined to require the exclusion of all hypotheses of innocence, yet those judges proceeded to reaffirm use of that analysis as a "construct to facilitate the application of the *Jackson* standard." *Butler v. State*, 769 S.W.2d at 238 n.1

What the Court of Criminal Appeals fails to understand is that *Jackson*'s rational fact-finder test and the reasonable-hypothesis construct are not harmonious phrasings of the same rule. The evidence in a criminal case could be strong enough to satisfy the rational fact-finder test but not strong enough to exclude as a matter of rigorous logic every hypothesis of innocence. Thus, application of the "analytical construct" can bring about the reversal of a conviction that would be affirmed under a proper application of *Jackson v. Virginia*. Use of the construct undermines, rather than facilitates, *Jackson*.

When this Court set out the basic sufficiency test in *Jackson*, it concluded with a citation to *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972):

> . . . the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See

> *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625.

Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. at 2789. At the cited pages in *Johnson v. Louisiana*, the Court addressed whether the reasonable-doubt standard was violated by a state statute allowing a conviction on a non-unanimous vote. In rejecting that argument, the Court said:

> **That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard.** Jury verdicts finding guilty beyond a reasonable doubt are regularly sustained even though the evidence was such that the jury would have been justified in having a reasonable doubt . . . .

Johnson v. Louisiana, 406 U.S. at 362-63, 92 S.Ct. at 1625 (emphasis added).

The effect of *Jackson* and *Johnson* is to divide criminal cases into three categories. In one category are cases where the evidence is so strong that every rational trier of fact would convict if it viewed the evidence in the light most favorable to the verdict. In the middle category, the incriminating evidence is less compelling, so while some rational fact-finders would convict, some would not. In the final category, the evidence is so lacking that no rational trier of fact would conclude that guilt was proven beyond a reasonable doubt even under the most favorable view of the evidence.

Under the rational fact-finder test, convictions in the middle category would be upheld because "any" (i.e., "some") rational trier of fact "could" convict even though another rational trier of fact could acquit. On the other hand, reasonable-hypothesis analysis overturns verdicts in the middle category, despite the presence of a rational theory of guilt beyond a reasonable doubt, because by definition there is also a rational theory of innocence. In other words, reasonable-hypothesis analysis upholds a conviction only if every rational trier of fact would convict under the most favorable view of

the evidence. This is the conflict the Texas courts either do not understand or will not acknowledge.[3]

This Court should grant review to correct this patent error by the Texas courts.

C. The decisions of the Texas courts are in conflict with those of several other state courts of last resort and with decisions of the United States Courts of Appeals.

The Sixth Circuit addressed our question in *York v. Tate*, 858 F.2d 322 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989). There, the federal district court applied reasonable-hypothesis analysis because the Ohio state courts used it. The Ohio doctrine was known as "the *Kulig* rule," referring to *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974). The Sixth Circuit rejected that approach under *Jackson v. Virginia*, saying:

> . . . . By applying the *Kulig* rule, the district court turned the *Jackson* standard on its head. Rather than asking whether *any* reasonable juror could have found petitioner guilty, the district court considered whether any reasonable juror could have found the petitioner *not* guilty . . . . Such an analysis is totally at odds with the

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[3]The Court of Criminal Appeals went astray when it failed to catch the analytical error in this statement: "if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding." *Carlsen v. State*, 654 S.W.2d at 449. *See also Butler v. State*, 769 S.W.2d at 238 n.1. That statement is contradicted by *Johnson v. Louisiana*, of course. Texas' approach came to its logical conclusion in *Martin v. State*, 753 S.W.2d 384 (Tex. Crim. App. 1988), where the court invoked *Jackson v. Virginia* and the reasonable-hypothesis construct, 753 S.W.2d at 387, and then made these observations about the sufficiency of the evidence:

> Just as a rational trier of fact could have found appellant guilty of the offense so also could a rational trier of fact have found that appellant had no idea that the methamphetamine was in his wife's purse . . . .
>
> While the facts may be highly suspicious, we are compelled to hold that the State did not sustain its burden of proof . . . .

Martin v. State, 753 S.W.2d at 388 (acquittal ordered).

> standard of review set forth by the Supreme Court in *Jackson* . . . .

York v. Tate, 858 F.2d at 330.

State courts of last resort have similarly concluded that *Jackson v. Virginia* does not require the incriminating evidence to exclude every reasonable hypothesis of innocence. *Commonwealth v. Latimore*, 378 Mass. 671, 393 N.E.2d 370, 374-75 (1979); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684, 689 (1981); *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314, 1318 (1988); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835, 837-38 (1981); *State v. Derouchie*, 140 Vt. 437, 440 A.2d 146, 148-50 (1981); *Poellinger v. State*, 153 Wis.2d 493, 451 N.W.2d 752, 757 (1990).

In addition, every United States Court of Appeals has abandoned use of reasonable-hypothesis analysis when reviewing federal convictions. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (collecting cases), *aff'd*, 462 U.S. 356 (1983).

II. THE IMPORTANCE OF THIS QUESTION IS DEMONSTRATED BY JUSTICE WHITE'S DESIRE TO GRANT CERTIORARI EARLIER THIS TERM IN *TEXAS V. SKELTON*.

The question we bring forward was presented to the Court by another Texas prosecution office earlier this term. *Texas v. Skelton*, 111 S.Ct. 210 (1990), *denying cert. to*, 795 S.W.2d 162 (Tex. Crim. App. 1989). Justice White's notation that he would have granted certiorari in *Skelton* is an indication of the importance of the question. In addition, we stress that in Respondent's case, perhaps unlike the situation in *Skelton*, the State has at every stage of the appellate process challenged the use of reasonable-hypothesis analysis as a method of applying *Jackson v. Virginia*'s rational fact-finder test. See supra, pp. 5-7.

III. THE CHALLENGED TEXAS DECISIONS ARE NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

A state court would, of course, be free to decide that state law holds the prosecution to a more stringent standard of appellate review than the United States Constitution mandates. However, a state may not, while purporting to rely on federal law, impose a stricter test than this Court has required. *See Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6, 101 S.Ct. 715, 722 n.6, 66 L.Ed.2d 659 (1981).

As discussed above, the Court of Criminal Appeals announced that *Jackson v. Virginia* contained the "ultimate" sufficiency test to be applied to both direct and circumstantial evidence cases, with the reasonable-hypothesis analysis being a tool "for applying" the *Jackson* test. *Carlsen v. State*, 654 S.W.2d at 449-50; *Butler v. State*, 769 S.W.2d at 238-39 & n.1.

Thus, the opinion in Respondent's case and the Court of Criminal Appeals decisions from which it draws succor "fairly appear to rest primarily on federal law, or to be interwoven with the federal law," and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Montana v. Hall*, 481 U.S. 400, 404 n.3, 107 S.Ct. 1825, 1827 n.3, 95 L.Ed.2d 354 (1987); *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). *See also Texas v. Brown*, 460 U.S. 730, 732 n.1, 103 S.Ct. 1535, 1538 n.1, 75 L.Ed.2d 502 (1983).

Indeed, the State can say with confidence that there is no decision in which a Texas court has made a "plain statement" under *Michigan v. Long* to the effect that the analytical construct of *Carlsen v. State* and *Butler v. State* is grounded solely in state law.

Finally, the Texas decisions at a minimum reveal the type of misunderstanding about federal law that would permit this

Court to exercise its jurisdiction and resolve the federal question, if only to enable the state court to address any state law question free of misconceptions concerning federal constitutional dictates. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977).

This Court has jurisdiction to decide the question presented, and it should exercise that jurisdiction in light of the flagrant error in the Texas courts' constitutional analysis.

IV. RESPONDENT'S CONVICTION WOULD HAVE BEEN AFFIRMED UNDER THE TRUE TEST OF *JACKSON V. VIRGINIA*.

The jury heard that Respondent attended an all night keg party. He drank beer during a drinking game early in the festivities, he behaved midway through the evening in a fashion that his former girlfriend was familiar with seeing when he was intoxicated (she said he "could have been" intoxicated at that time), and he consumed at least a beer and a half in the early morning hours before leaving on the tragic motorcycle ride. Respondent smelled strongly of alcohol when tracked down near the scene of the wreck and when examined by medical personnel. He refused to go to the aid of his injured companion because he was afraid the police would jail him.

From this evidence alone, a rational jury *could* have concluded that Respondent was intoxicated at the time of the wreck. Yet the Court of Appeals dismissed the impact of this proof virtually without explanation. Appendix at A-3-4. True, there may be a possibility that Respondent had not lost the normal use of his faculties despite evidence of his drinking and abnormal behavior, but a jury was not compelled to reach that conclusion.

In addition, the undisputed evidence established that Respondent had an alcohol concentration of 0.19 about two hours after the accident. Two witnesses told the jury that the legal limit for intoxication in Texas was 0.10.

The court below, however, minimized this evidence by noting that an alcohol concentration of 0.10 was not conclusive proof of intoxication under the involuntary manslaughter statute (presumably raising, in the court's mind, the reasonable hypothesis that Respondent had not actually lost the normal use of his faculties), by noting the absence of testimony that Respondent staggered, swayed, or slurred his speech (factors which the jury was equally able to consider in its deliberations), and by claiming there was no testimony concerning the effect of a 0.19 alcohol concentration (failing even to mention the medical and scientific experts who told the jury the legal limit was 0.10).[4] Appendix at A-3-5. Surely a rational jury *could* conclude that a person that far above the legal limit was not fully in control of himself, just as those jurors would surely have felt they were in trouble had their doctor told them their blood pressure or cholesterol level was almost twice the medical limit.

Finally, the jury had before it the blood-test form on which the detective expressed an opinion that Respondent was intoxicated. Perhaps the preprinted nature of that form could have caused a jury to downplay its importance, but on the other hand, a rational jury could have accorded it significant weight.

Had the Court of Appeals considered the impact of this evidence as an interrelated whole under *Jackson v. Virginia*, rather than as isolated bits of proof concerning which an appellate court seeks to discern inferences supporting an acquittal, the court would have realized that a rational jury *could* have concluded that Respondent was intoxicated, even if the jury would not have been compelled to so find.

This is a classic example of a case that is affirmable under *Jackson v. Virginia* even if the reasonable-hypothesis construct is not satisfied. It provides an excellent vehicle to make that distinction clear to the Texas courts.

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[4]It is especially odd that the Court of Appeals ignored that testimony when Respondent himself thought it important to bring out that the victim had an alcohol concentration above the "legal limit" as well. R. V – 329 (victim's level was 0.14).

CONCLUSION

The Court should grant certiorari and review the judgment below. The inconsistency between *Jackson's* rational fact-finder test and the reasonable-hypothesis construct is so clear that a summary reversal would be appropriate.

The Court may wish to withhold immediate action on this petition. During the past year, the Court of Criminal Appeals has granted review in several cases to consider whether the *Carlsen-Butler* construct should be repudiated as in conflict with *Jackson v. Virginia*. The lead case, *Geesa v. State*, #290-90 (Tex. Crim. App. pet. granted May 23, 1990), was filed by this office and argued by this writer on January 10, 1991. To be frank, we are not optimistic that the Court of Criminal Appeals will decide this issue in our favor. This writer would characterize the reception he was given in the *Geesa* oral argument as chilly, and the Court of Criminal Appeals refused the State's motion for rehearing in Respondent's case some two weeks later despite the fact that the pendency of *Geesa* and related cases had been expressly called to the court's attention. The State will, of course, immediately advise this Court of any disposition in *Geesa* or its companions that might affect this Court's decision to grant or deny certiorari.

Respectfully submitted,

TIM CURRY
District Attorney
Tarrant County, Texas

C. CHRIS MARSHALL
Assistant District Attorney
Chief, Appellate Section
Counsel of Record

Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS FOR THE
SECOND COURT OF APPEALS DISTRICT OF TEXAS

NO. 02-89-072-CR

CARY WAYNE COX
VS.
THE STATE OF TEXAS

Delivered June 14, 1990

OPINION

Cary Wayne Cox was convicted by a jury of involuntary manslaughter. *See* TEX. PENAL CODE ANN. sec. 19.05 (Vernon 1974). The jury assessed punishment at six years confinement in the Texas Department of Corrections and a $5,000 fine both of which were probated for four years. Cox contends on appeal that the evidence was insufficient to support his conviction for involuntary manslaughter.

We reverse the judgment of the trial court because the evidence is insufficient to sustain his conviction.

On June 27, 1987, appellant, Cary Wayne Cox, and the victim, Tracey Dawn Higgins, attended a party where there was a keg of beer from which the party-goers drank. Sometime between 4:45 a.m. and 5:00 a.m., Steve Adkins, a fellow party-goer, allowed Cox to take his motorcycle for a ride, and Cox took Higgins along with him.

The accident occurred approximately three blocks from the house where the party was held. Higgins was apparently thrown from the motorcycle and died within one and a half hours after the accident occurred. Testimony revealed that Cox left the scene even though he had also been hurt. He was later found, treated by paramedics, and subsequently taken to Harris Hospital. At the hospital, a blood test was taken which

resulted in a 0.19% weight volume ethyl alcohol or 0.19 grams of alcohol per 100 milliliters of blood.

In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. State*, 672 S.W.2d 801, 803 (Tex.Crim.App. 1984); *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App. 1984) (opinion on reh'g); *Wilson v. State*, 654 S.W.2d 465, 471-72 (Tex.Crim.App. 1983) (opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant. *Johnson v. State*, 673 S.W.2d 190, 195 (Tex.Crim.App. 1984); *Jackson*, 672 S.W.2d at 803.

Appellant contends there is insufficient evidence to prove that he was intoxicated at the time of the accident, or that he was the driver of the motorcycle at the time of the accident. We will not discuss appellant's argument that the State failed to prove he was the driver of the motorcycle at the time of the accident because we find the evidence was insufficient to establish that Cox was intoxicated at the time of the accident.

Cox was convicted of involuntary manslaughter under the former version of TEX. PENAL CODE ANN. sec. 19.05 which provided in part:

> (a) A person commits an offense if he:
>
> (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical facilities by reason of the voluntary introduction of any substance into his body.

Ch. 426, art. 2, sec. 1, 1973 Tex. Gen. Laws 1122, 1124, *amended by* ch. 307, sec. 1, 1987 Tex. Gen. Laws 1698.

A review of the record reveals that Cox's ex-girlfriend saw him drink a quarter of a cup of beer and testified that, based on his actions in which Cox chased her around the car, he *could have been* intoxicated. Adkins, the owner of the motorcycle, testified that he and Cox drank one and one-half beers before Cox left on the motorcycle. He testified he remembered Cox was not drinking earlier because he remembered thinking it was kind of odd not to see him drink. In addition, there was testimony by a police officer, a paramedic, and a witness who came upon the scene of the accident that Cox smelled of alcohol.

Cox concedes there was evidence he had been drinking beer around the time of the accident. However, Cox contends there was no evidence that he had lost the normal use of his mental or physical faculties because of the beer. Therefore, he argues the evidence was insufficient that he was either intoxicated at the time of the accident or that the alleged intoxication actually caused the accident.

The State concedes the expert testimony that the 0.19% blood alcohol concentration which was over the legal limit was not by itself sufficient to show that Cox had lost the normal use of his mental or physical faculties under the definition of "intoxication" in the involuntary manslaughter statute at the time of the offense. However, the State asserts that the testimony that Cox had consumed beer before the accident, the testimony by the police officer, paramedic, and another witness that Cox smelled of alcohol, and the fact that the blood test revealed 0.19% alcohol rendered the evidence sufficient to sustain the conviction for involuntary manslaughter.

The State directs our attention to *Martin v. State*, 724 S.W.2d 135 (Tex.App. – Fort Worth 1987, no pet.) and *Irion v. State*, 703 S.W.2d 362 (Tex.App. – Austin 1986, no pet.). In *Martin*, the court held the testimony of the arresting officer that the defendant stumbled as he got out of his car, staggered and swayed as he stood, slurred his speech, had bloodshot and watery eyes, and failed three field sobriety tests, together with the testimony of the expert witness who stated that someone who tested at 0.21% on an intoxilyzer test, would not have the normal use of his mental or physical faculties by means of the introduction of alcohol into his system, constituted sufficient evidence to establish the defendant's intoxication at the time of his arrest. *Martin*, 724 S.W.2d at 137.

Furthermore, the court in *Irion* held that the opinion testimony of the arresting officer standing alone was sufficient to prove the element of intoxication. *Irion*, 703 S.W.2d at 364. However, in *Irion*, as in *Martin*, the arresting officer testified that the defendant was weaving while driving, had bloodshot eyes, smelled of alcohol, swayed, and failed a field sobriety test. Both of these cases can be distinguished from the present case because in the present case the only testimony from the officer was that Cox smelled of alcohol. There was no testimony from either the officer, the paramedic, or the other witness that Cox was staggering, swaying, slurring his speech, or had bloodshot eyes. In addition, there was no testimony in the present case as to what effect someone who tested at 0.19% on an intoxilyzer test would have on the normal use of his mental or physical faculties.

Cox relies on *McCafferty v. State*, 748 S.W.2d 489, 491 (Tex.App. – Houston [1st Dist.] 1988, no pet.), for the proposition that since the State failed to explain absorption and metabolism rates of intoxication or in any way connect the blood test results to his condition some two hours earlier, the blood test results were insufficient to establish either intoxication at the time of the accident or that the alleged intoxication actually caused the accident. In *McCafferty*, the court held that the officer's testimony that the defendant was intox-

icated when the officer arrived at the accident at 3:50 a.m. together with the breath test showing that the defendant was intoxicated at 4:45 a.m. were alone not sufficient to establish that the defendant was intoxicated at 2:30 a.m. when driving. *Id.* at 491.

The court further held that the State's expert witness did not explain absorption and metabolism rates or in any way connect the breath test results at 4:45 a.m. to the defendant's condition when driving at 2:30 a.m. and therefore, concluded the State failed to show that the defendant was intoxicated while driving and found the evidence to be insufficient to support the conviction.

Because the involuntary manslaughter statute in effect at the time of the accident did not provide for having an alcohol concentration of 0.10% or more as a means of proving intoxication, the fact that Cox tested at 0.19% is alone not sufficient without some testimony regarding the effect a 0.19% alcohol concentration would have on a person's mental or physical faculties. Therefore, after a careful review of the record, we hold the evidence was insufficient to sustain his conviction for involuntary manslaughter. Cox's point of error is sustained.

Finding insufficient evidence to sustain appellant's conviction for involuntary manslaughter, we reverse and remand the judgment of the trial court with an order instructing the trial court to enter a judgment of acquittal.

/s/
DAVID F. FARRIS,
JUSTICE

PANEL A
FARRIS, DAY, JJ.; LATTIMORE, J. (Not Participating)
DO NOT PUBLISH
TEX. R. APP. P. 90(e)

JUN 14 1990

IN THE COURT OF APPEALS FOR THE
SECOND COURT OF APPEALS DISTRICT OF TEXAS

No. 2-89-072-CR

Cary Wayne Cox
vs.
The State of Texas

Delivered July 18, 1990

ORDER

On this day came on to be considered State's motion for rehearing and appellant's response.

It is the opinion of this Court that said motion should be and is hereby overruled. It is the order of this Court that the opinion and judgment of June 14, 1990, stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 18th day of July, 1990.

/s/ _____
DAVID F. FARRIS
JUSTICE

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

No. 0912-90

CARY WAYNE COX
VS.
THE STATE OF TEXAS
(COA#: 02-89-00072-CR)

Delivered October 17, 1990

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

No. 0912-90

CARY WAYNE COX
VS.
THE STATE OF TEXAS
(COA#: 02-89-00072-CR)

Delivered January 30, 1991

On this day the State's Motion for Rehearing was denied. Judge Baird would grant on nos. 1 & 2.

Thomas Lowe, Clerk

IN THE COURT OF APPEALS FOR THE
SECOND COURT OF APPEALS DISTRICT OF TEXAS

NO. 02-89-0072-CR

CARY WAYNE COX
V.
THE STATE OF TEXAS

STATE'S MOTION FOR REHEARING
[Excerpts]

TO THE COURT OF APPEALS:

POINTS ON REHEARING

. . . .

2. The Court of Appeals has reviewed the evidence under a standard more stringent than is required by *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and reliance on this improper standard has caused the Court to reverse a conviction which is clearly affirmable under the proper standard.

DISCUSSION

. . . .

II. Reasonable Hypothesis Standard

At page three of the slip opinion, the Court recites that ". . . a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant." The reversal indicates that the Court has discerned a reasonable hypothesis of innocence.

As it has done in many other cases before this Court, the State reiterates that the reasonable-hypothesis analysis is inconsistent with *Jackson v. Virginia*. *Jackson* asks only whether *any* trier of fact could have rationally found guilt

beyond a reasonable doubt. The reasonable hypothesis construct asks whether there is any reasonable hypothesis of innocence. This turns the *Jackson* test upside down. Instead of asking whether any trier of fact could have rationally convicted, the construct asks if any trier of fact could have rationally acquitted. Stated another way, the court is asking not whether *any* trier of fact could have rationally convicted, but whether *every* trier of fact would have rationally been compelled to convict.

This Court should renounce, or at least call into question, the reasonable-hypothesis-of-innocence analysis. [footnote omitted] That analysis is in conflict with *Jackson* and has caused the Court to reverse a conviction that is eminently affirmable under a proper application of the *Jackson* test.

. . . .

[State's motion for rehearing in Court of Appeals, pp. 2, 7-8.]

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

NO. 0912-90

CARY WAYNE COX
V.
THE STATE OF TEXAS

STATE'S PETITION FOR REVIEW

[Excerpts]

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

. . . .

GROUNDS FOR REVIEW

. . . .

3. The Court of Appeals erred by applying the wrong standard of appellate review. The language in *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), and previous cases holding that the reasonable hypothesis standard is properly applied as an "analytical construct" of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), should be overruled as it is in conflict with *Jackson v. Virginia*.

. . . .

DISCUSSION

. . . .

The error in this Court's analysis is that it correctly identifies and purports to follow the basic *Jackson* test (whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found every element of the offense beyond a reasonable doubt), but then erroneously goes on to conclude that the converse is true (that if the evidence supports an inference other than guilt, a finding

of guilt beyond a reasonable doubt is not a rationai finding). *See Butler v. State*, 769 S.W.2d at 238, n.1, quoting *Carlsen v. State*, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983).

The converse is not true, or at least this Court's statement of the converse misapprehends the thrust of *Jackson v. Virginia*. *Jackson* asks only whether *any* trier of fact could have rationally found guilt beyond a reasonable doubt. The Court's application of the "analytical construct," asking whether there is any reasonable hypothesis of innocence, turns the *Jackson* test upside down. Instead of asking whether any trier of fact could have rationally convicted, the construct asks if any trier of fact could have rationally acquitted. Stated another way, the court is asking not whether *any* trier of fact could have rationally convicted, but whether *every* trier of fact would have rationally been compelled to convict.

. . . .

[State's petition for review, pp. 2, 12.]